



In the Matter Of:

JUDY K. STEPHENSON,

ARB CASE NO. 98-025

COMPLAINANT,

ALJ CASE NO. 94-TSC-5

v.

DATE: July 18, 2000

**NATIONAL AERONAUTICS &
SPACE ADMINISTRATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

Lori A. Tetreault, Esq., *Lawrence, Mutch & Tetreault, P.A., Gainesville, Florida*

For the Respondent:

David A. Samuels, Esq., *NASA Lyndon B. Johnson Space Center
Houston, Texas*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), which prohibits employers from discharging or otherwise discriminating against employees because they have engaged in certain protected activities. Complainant, Judy K. Stephenson (Stephenson), was an employee of Martin Marietta Corp. and worked at the Johnson Space Center in Texas under Martin Marietta's contract with Respondent, the National Aeronautics and Space Administration (NASA). Stephenson filed this complaint against NASA and Martin Marietta alleging that NASA violated the employee protection provision when it barred her from the Space Center and from discussing her work with NASA employees, which she asserted effectively prevented her from performing her job. She contended that NASA took these actions because she made complaints about the safety of using a chemical, ethylene oxide (ETO), to sterilize medical equipment that astronauts would employ on the space shuttle.

An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (RD&O) dismissing the complaint on the ground that NASA was not Stephenson's employer and therefore could not be held liable under the CAA's employee protection provision. Under the automatic review provision in the regulations then in effect, this case is before the Administrative Review Board for final decision.^{1/}

We accept the ALJ's recommendation and dismiss the complaint, although we do so for reasons other than those cited by the ALJ. As a preliminary matter, we once again conclude (contrary to the ALJ) that the ambit of the CAA's employee protection provision under some circumstances may extend to an employer which, like NASA, indisputably is not the direct or immediate employer of the employee alleging discrimination. We discuss this issue to provide future guidance on the proper analysis of this issue regarding the scope of the CAA employee protection provision. However, consideration of the entire record leads us to conclude that Stephenson's complaints about the use of ETO did not constitute activity protected by the CAA employee protection provision. And even were we to find that Stephenson did engage in protected activities, we would conclude that NASA did not take action against her because of those activities.

BACKGROUND

I. Facts

Stephenson, who has a Bachelor of Science degree in medical technology, worked in various jobs prior to being hired in April 1990 by GE Government Services, which later became Martin Marietta Services, Inc. (Martin Marietta). Her prior work experience included positions as a medical technologist in hospitals.

During her work in hospitals, Stephenson learned about using ethylene oxide (ETO) as a sterilizing agent for medical devices. ETO is a gas which is toxic to humans, causing a variety of reactions, including redness of the skin, burns, nausea, and vomiting. The chemical also is mutagenic, causing chromosomal aberrations. There have also been reports that chronic exposure to low levels of ETO causes other serious health problems, including spontaneous abortions, neurological problems, and breast cancer.

The dangers of ETO exposure are such that the substance is regulated by various Federal agencies. The Department of Transportation classifies ETO as a poison and requires that containers of ETO be labeled in transportation. The Food and Drug Administration has issued guidelines on the levels of ETO permitted in sterilized devices and drugs. The Occupational Safety and Health Administration of the Department of Labor regulates the allowable amount of ETO exposure for workers. And, most relevant to this case, the Environmental Protection Agency (EPA) has issued

^{1/} At the time of the ALJ's decision, the regulations governing complaints brought under the CAA's employee protection provision provided for automatic review of an ALJ's recommended decision by the Administrative Review Board. 29 C.F.R. §24.6 (1997).

a National Emission Standard for sterilization facilities that use one ton or more of ETO annually. The EPA's regulation limits the amount of ETO which may be emitted from a facility which uses it, based on how much ETO the facility uses and how it is emitted from the building in which it is used. *See* 40 C.F.R. §63.360 (1999).

Martin Marietta contracted with NASA's Life Sciences Directorate to provide support in the form of employees and work products. As a Martin Marietta employee, Stephenson worked on medical devices that were used in NASA's space flight program. In early November 1993, Martin Marietta assigned her to assemble peripheral venous pressure devices ("PVPDs" or "the devices"), which are used to measure blood pressure. PVPDs were to be used by astronauts during a planned shuttle flight in January 1994. In addition, some of the devices were to be used on paid human test subjects at NASA's Johnson Space Center.

The PVPD project, on which both Martin Marietta and NASA employees worked, was conducted in a location on the Space Center property that was nicknamed the "clean room." Stephenson and other workers removed three plastic medical parts from their individual, sterile packages and assembled them into the PVPDs. The workers placed the assembled PVPDs into a pail of tap water to determine if the devices leaked. The PVPDs next were placed on a table to air dry. After some period of drying, the PVPDs were sent to a local hospital for sterilization with ETO. After sterilization, the devices were ready to be used on humans, either in ground tests or on board the space shuttle.

Stephenson believed strongly that the assembly of PVPDs at the Space Center was being mishandled, and created health risks. She was dismayed that the workers were directed to remove the parts of the devices from their sterile packaging without observing standard medical practice. Stephenson knew that to prevent contamination with spores or bacteria it was important for a medical device to be in the cleanest possible condition before any reesterilization. She also was concerned because the room in which the devices were assembled was not a clean room in the medical sense. The room did not have an operational air filter system. Also, the room's negative air flow system did not work properly to ensure that, when the door was opened, no outside air flowed into the room. Further, Stephenson believed it was improper that several employees' desks were in the room.

Stephenson believed that there is a high failure rate for sterilization with ETO and also that some ETO residues are left in medical devices after sterilization. She was concerned about whether the ETO residues were "off-gassed" properly after the PVPDs were sterilized.

Early in November 1993, Stephenson reported her concerns about the assembly and sterilization of the devices to a NASA project leader, Angie Lee. Stephenson asked to see the documentation approving the procedures that were being used. Stephenson followed up with a November 12, 1993 e-mail to Lee and to Dave Geaslin, her Martin Marietta supervisor, explaining further her objections about the methods used for PVPD assembly. Lee responded that she would convey Stephenson's concerns to another NASA employee who was working on the PVPD project, Jennifer Villarreal. Villarreal investigated and promptly informed Stephenson that the safety

committee had approved the PVPD assembly and sterilization processes, and that all of the ETO was removed from the devices.

Unconvinced by Villarreal's response, on November 12 Stephenson told NASA manager Bill Seitz about her concerns regarding the non-sterile method of assembling the PVPDs, the reliability of ETO sterilization, and the possibility that ETO residue was left on the medical hardware, resulting in the possibility that residual ETO could "off-gas" in the space shuttle. Seitz asked Stephenson to help him investigate her concerns. Stephenson agreed and called a sterilization company to get information regarding ETO sterilization. Learning from the company that freon was used as the carrier gas in ETO sterilization caused Stephenson additional concern about the process. She shared the information about freon with Seitz, who took all of Stephenson's concerns seriously and notified the NASA division chief, Catherine Kramer, about them.

A few days after speaking with Seitz, without authorization Stephenson took 75 assembled PVPDs that were drying on the worktable in the clean room and placed them next to the trash in the hallway outside the room. Stephenson intended to dispose of the devices. One hour later, Hugh Fitzgerald, a Martin Marietta employee, asked Stephenson if she had placed the PVPDs in the hall. Fitzgerald told Stephenson that NASA should be in charge of disposal of the devices because they were NASA's property. Stephenson agreed, retrieved the PVPDs, and placed them back on the table in the clean room.

Kramer was extremely upset when she learned that Stephenson had removed the devices from the clean room and placed them in the hall. Kramer had never heard of anyone throwing away flight hardware, even if possibly contaminated, except by using the proper procedures.^{2/} Kramer held a meeting concerning Stephenson's action with Seitz and Richard Kitterman of Martin Marietta.^{3/} Kramer told Kitterman that she did not want Stephenson handling any of the flight hardware.^{4/} After that meeting, at Kitterman's direction Pat Hite issued a written reprimand to Stephenson for her unauthorized disposal of the PVPDs. The reprimand stated that flight hardware was to be handled under NASA procedures, which did not permit disposal without NASA approval and a completed

^{2/} The proper procedure would have consisted of asking quality assurance personnel to write a "TPS" or Discrepancy Report concerning the techniques being used and the possible off-gassing of toxic ETO. Any possibly contaminated hardware would not have been used in flight until the TPS or Discrepancy Report had been resolved.

^{3/} Stephenson's immediate supervisor, Pat Hite, reported to Joe Mims, who in turn reported to Kitterman.

^{4/} NASA supervisor Seitz agreed with Kramer that Stephenson acted inappropriately by disposing of the PVPDs, and that it was necessary to make sure that "this kind of thing didn't happen again." At the time he testified, Seitz no longer worked for NASA and readily admitted that he had not gotten along well with his former supervisor, Kramer. Despite his differences with Kramer, Seitz agreed with Kramer's decision that Stephenson had to be kept away from flight hardware to prevent any similar incidents from happening. Similarly, NASA's Villarreal was shocked by Stephenson's action; she had never heard of anyone destroying flight hardware.

Discrepancy Report form. The reprimand advised that “further misconduct will lead to disciplinary action up to and including discharge.”

Upon receiving the written reprimand, Stephenson explained her actions to Hite and assured him that she still had the same concerns about using the PVPDs on the space shuttle. She asked to be reassigned to work on some other project. In a parallel action, Kramer decided that Stephenson should not be allowed to work on, or even to be near, NASA space hardware. Martin Marietta assigned Stephenson to work on the same devices, PVPDs, that were being assembled in the same way for use on the Russian space station, Mir. Stephenson’s new work station was located at a Martin Marietta facility outside the Johnson Space Center.

In the meantime Villarreal completed a Discrepancy Report, explaining that there was a loss of traceability when the 75 PVPDs were moved without the proper documentation. As a result, NASA could not use the PVPDs on humans and Martin Marietta had to assemble new devices for use on the January shuttle flight. Martin Marietta reimbursed NASA about \$4,700 to cover the cost of the unusable PVPDs.

Having not heard anything further about her complaints to NASA and Martin Marietta about the PVPD assembly and sterilization process, Stephenson spoke with an agent in the Inspector General’s (IG) office of NASA in early December 1993. She told the agent that the ETO in the PVPDs was not “off-gassed” properly, and that it could affect the environment within the space shuttle. She also informed the agent that the shuttle crew might contract a blood infection if the PVPDs were not sterilized properly. She asked the agent to keep her name confidential because she feared retaliation. Nevertheless, the IG gave NASA a document that implicated Stephenson as the source for the IG’s investigation into the PVPD sterilization process.

The next month, on January 13, 1994, Stephenson went to Building 36, her former work station at the Space Center, to borrow a book from a NASA employee. Stephenson stopped in the clean room to visit her co-workers there for a few minutes. Stephenson noticed that the other workers looked apprehensive when she walked into the room and perceived that she was not welcome there. Stephenson stayed only briefly, did not notice that there were PVPDs in the room, and did not touch anything.

Kramer soon learned about Stephenson’s brief visit. In a subsequent meeting, Kramer told Kitterman that she did not want Stephenson in the clean room, in any part of the Space Center, or talking about work to NASA Life Sciences personnel.

In response to Kramer’s concerns, Kitterman and other Martin Marietta employees issued a memorandum to Stephenson stating that, on Kramer’s direction, Stephenson no longer had access to the Space Center and could not speak with NASA Life Sciences employees about her work. The memo further stated that these actions were not expected to hinder Stephenson’s ability to perform her job. The next week, the memorandum was distributed throughout Building 36 at the Space Center. In response to the memorandum, Stephenson turned in her Space Center parking sticker and badge.

Stephenson felt that the restrictions placed on her by the Kitterman memorandum hampered her work. She was a member of a team of Martin Marietta workers that routinely met in Building 36, from which she was barred. She needed to talk to workers in the Life Sciences Directorate to get clear instructions on her assigned work, but could not do so. Nor could she use the technical library, which contained the instructions for and drawings of the devices on which she worked.

Stephenson complained to her superiors that the ban prevented her from attending meetings at the Space Center. On one occasion, a company-wide Martin Marietta meeting was held at the Space Center and a manager was assigned to escort Stephenson the entire time she was on Space Center property. Stephenson felt embarrassed about being seen with an escort. Less than a month after receiving the memorandum barring her from the Space Center, Stephenson filed this complaint.

II. Procedural History

This case has a tortured procedural history, spanning over six years. Stephenson initially filed this complaint solely under the employee protection provision of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994). The respondents were NASA, Martin Marietta, and five NASA employees (“individual Respondents”). She alleged that the various respondents had altered the terms and conditions of her employment because she raised concerns under the TSCA. After an investigation, *see* 29 C.F.R. §24.4, the Department of Labor’s Wage and Hour Division issued a finding that the Respondents had not violated TSCA.

Upon receiving the adverse finding, Stephenson requested a hearing before an ALJ. Stephenson amended the complaint to name the DOL investigator as an additional Respondent and to allege that all of the Respondents had also violated the CAA.

Prior to a hearing, Stephenson and Martin Marietta reached a settlement, which the Secretary approved. Partial Decision and Order Approving the Settlement, June 19, 1995.

On its part, NASA sought dismissal of the TSCA claim on the ground that the United States had not waived its sovereign immunity under that statute. NASA also sought dismissal of all of the individual Respondents on the ground that they were not “employers” within the meaning of the employee protection provision. Finally, contending that Stephenson had not alleged any connection between her complaints about ETO and the purpose of the CAA – regulating air pollution – NASA sought dismissal of the CAA complaint for failure to state a claim upon which relief could be granted. Thereafter the ALJ issued orders recommending the dismissal of all of the individual Respondents and of the complaint against NASA. Recommended Order Dismissing Individual Respondents, June 21, 1994; Recommended Order Dismissing Complaint, June 27, 1994 (June 27, 1994 R.O.). The ALJ concluded that the United States had not waived its sovereign immunity under the TSCA, and that Stephenson had failed to state a CAA claim upon which relief could be granted. June 27, 1994 R.O.

A. Remand Number 1

On review, in a July 1995 decision, the Secretary^{5/} rejected the ALJ's recommended dismissal of the CAA claim, ruling that Stephenson stated a claim under the CAA:

Admittedly, Complainant nowhere alleged discretely that she was subject to discrimination because of a complaint about the emission of dangerous substances into the atmosphere . * * *

Rather, the complaint concerned astronauts being exposed, within the space capsule, to ethylene oxide and freon. On first impression the complaint appears concerned with occupational, rather than public, safety and health. Ethylene oxide and freon, however, are precisely the types of substances reasonably perceived as subject to CAA regulation, which is sufficient in these circumstances to bring the complaint within the purview of that Act. . . . I find that Complainant has stated a claim under the CAA.

Sec. Dec. and Ord. of Rem., July 3, 1995 ("July 3, 1995 Decision"), slip op. at 2-3. In the same decision, the Secretary granted NASA's remaining motions, dismissing all of the individual Respondents because they were not employers within the meaning of the CAA's employee protection provision. The Secretary also dismissed the TSCA complaint because the United States has not waived its sovereign immunity under that act except in a narrow set of circumstances involving lead-based paint, which is not at issue here.^{6/} *Id.* at 8. The Secretary remanded the case to the ALJ for a hearing on the sole remaining claim, Stephenson's complaint against NASA under the CAA. *Id.*

Before the ALJ, NASA moved to dismiss the CAA claim on the ground that Stephenson was not NASA's employee and that NASA could not be considered her employer for purposes of the CAA's employee protection provision. The ALJ granted the motion in a recommended decision. Rec. Ord. Grant. Mot. to Dis., Aug. 4, 1995.

B. Remand Number 2

On review of this second ALJ recommended decision, the Secretary initially rejected the ALJ's recommendation on procedural grounds and remanded for a hearing. Sec. Dec. and Ord. of Rem., Aug. 21, 1995 ("August 21, 1995 Decision"). However, the Secretary granted NASA's

^{5/} Prior to 1996 the Secretary of Labor issued final agency decisions under the environmental statutes. On April 17, 1996, the Secretary issued Secretary's Order 2-96, which delegated that authority to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (1996). Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing the reorganization were promulgated simultaneously.

^{6/} The United States has waived its sovereign immunity and made itself subject to the TSCA only for certain defined lead-based paint hazards. 15 U.S.C. §2688 (1994); see *Berkman v. United States Coast Guard Academy*, ARB Case No. 98-056, ALJ Case Nos. 97-CAA-2 and 97-CAA-9, Fin. Dec. and Ord., Feb. 29, 2000, slip op. at 13-14.

subsequent motion for reconsideration and vacated the decision. On reconsideration, the Secretary treated NASA's motion to dismiss as a motion for summary judgment, concluded that there were genuine issues of material fact concerning whether NASA's relationship with Stephenson was such that it might be held liable under the CAA whistleblower provision, and again remanded the case for further proceedings before the ALJ. Ord. of Rem., Sept. 28, 1995.

NASA then filed a motion for summary decision with the ALJ, asserting there existed no employment relationship between Stephenson and NASA, and therefore NASA could not be held liable for retaliation under the CAA employee protection provision. The ALJ granted that motion:

[T]he theory of violation advanced by Complainant against NASA in her consolidated complaint is that NASA violated the prohibitions of 42 U.S.C. §7622 by causing Complainant's employer Martin Marietta Services to initiate certain specified adverse employment actions against Complainant. Such complaint simply cannot reasonably be construed as alleging that a co-employment or shared employment relationship exists under which NASA is also Complainant's employer.

Rec. Ord. Dismiss. Com. on Sum. Dec., Feb. 26, 1996 (R. O. D.), slip op. at 3 .

C. Remand Number 3

On review, the Administrative Review Board rejected the ALJ's February 26, 1996 R. O. D. The Board held:

Without deciding the exact breadth appropriately accorded [the statutory terms "employer" and "employee"], we do conclude that, in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer. . . . The issue of employment relationship necessarily depends on "the specific facts and circumstances" of the particular case, however.

Dec. and Ord. of Rem., Feb. 13, 1997 (“February 13, 1997 Order”) at 3-4, citation omitted. Once again, the ARB remanded the case, this time “for the creation of a complete factual record for use in deciding the issues of coverage and liability.” *Id.*

NASA asked the Board to reconsider the February 13, 1997 Order. The Board granted reconsideration and affirmed its February 13, 1997 Remand Order in an Order dated April 7, 1997. The Board further clarified its holding on the employment relationship issue:

A [CAA employee protection provision] complaint requires an allegation of employment discrimination, *i.e.*, that an employer’s action adversely affected a complainant’s employment, *i.e.*, the compensation, terms, conditions or privileges of employment. In this sense, an “employment relationship” is essential to the complaint. The employment relationship may exist between the complainant and the immediate employer. In appropriate circumstances, however, protection may extend beyond the immediate employer.

April 7, 1997 Order, slip op. at 2.

III. The ALJ’s Most Recent Decision

Following Remand Number 3 a five day hearing was held before the ALJ. NASA again argued that Stephenson had not established that the concerns she raised about ETO and freon were within the purview of the CAA, and that, because NASA was not Stephenson’s direct employer, it could not be held liable under the CAA employee protection provision. The ALJ agreed in a Recommended Decision and Order (R. D. & O.). With regard to the employment relationship issue the ALJ made no reference to either of the ARB’s orders remanding the case to him and held that “employees are protected from discriminatory acts committed only by *their employers*.” R. D. and O. at 53 (emphasis added). The ALJ examined whether Stephenson was NASA’s employee within the common law meaning of the term, and concluded that “Complainant has failed to establish that Respondent was her joint employer, exercised power, control, and authority over the terms and conditions of her employment, or controlled the manner and means by which the ultimate product was accomplished.” *Id.* at 61.

With regard to whether Stephenson had engaged in protected activity when she complained about the possibility of off-gassing of ETO and freon in the space shuttle and in the laboratory, the ALJ concluded that the Secretary already had ruled, in the July 3, 1995 Decision, that Stephenson stated a CAA claim: “The Secretary held that Complainant’s consolidated complaint was sufficient to bring this matter within the purview of the Clean Air Act because it indicated her concern for the astronauts based on the potential exposure to ETO and Freon gas within the space capsule.” *Id.* at 50. The ALJ found that the earlier ruling had a collateral estoppel effect and was the “law of the case” and could not be revisited. *Id.* Nevertheless, in a lengthy footnote, the ALJ noted that in enacting the CAA, Congress may not have intended to regulate “negligible amounts of ETO” released into a closed environment, such as a space shuttle or a laboratory. *Id.* at n.49. The ALJ also

stated that Stephenson's concern about the effects from intravenous use of the sterilized devices arguably was a medical or occupational health issue, rather than an environmental one. *Id.*

The ALJ recommended dismissing the complaint.

DISCUSSION

As our recitation of the procedural history of this case demonstrates, it is high time for this Board to bring this administrative adjudication to an end. We are constrained to note that never have there been so many remands to so little avail. In this – our last – decision in this case, we: (1) reiterate our prior rulings that there need not be a direct employer-employee relationship in order for there to be liability under the CAA employee protection provision and emphasize that those rulings are law of the case; (2) hold that collateral estoppel and the doctrine of law of the case did not prevent the ALJ from determining whether Stephenson engaged in protected activity when she complained about the possibility that ETO and freon would be released in the space shuttle, thus potentially endangering the astronauts; (3) find that Stephenson did not engage in activity protected by the CAA when she made those complaints; and (4) find that even if we were to assume that Stephenson engaged in protected activity, NASA did not take action against her because of that activity. Therefore, we dismiss the complaint.

I. The law of the case doctrine prohibited the ALJ from ruling that the CAA employee protection provision cannot cover an employer which is not the employee's employer within the common law definition of the term.

Twice in this case the Administrative Review Board has ruled that an employer who is not an employee's common law employer may nevertheless be held liable for retaliation under the CAA employee protection provision. We review this history and reiterate our construction of this aspect of the CAA.

From the inception of this case NASA has argued that the CAA should be construed to apply only to the direct or immediate employer of an employee who has engaged in protected activity and as a result has been subjected to adverse employment action. In his February 26, 1996 decision recommending summary judgment, the ALJ adopted this interpretation of the statute, relying upon the Supreme Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344 (1992) (under ERISA), and the Secretary's decision in *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y April 3, 1995), *aff'd sub nom Reid v. Secretary of Labor*, No. 95-3698 (6th Cir. Dec. 20, 1996), (unpublished decision available at 1996 U.S. App. LEXIS 33984). The ALJ concluded that "the prohibition[] contained in the employee protection provision of CAA applies only to Complainant's employer and the remaining question is whether NASA is Complainant's employer under common law principles applicable to master-servant relationships." February 26, 1996 Order, at 2. Applying those principles to the facts alleged, the ALJ ruled that "Complainant is not NASA's employee and Complainant's complaint against NASA under [the CAA employee protection provision] cannot be maintained." *Id.* at 3-4.

On review, the ARB rejected the principle underlying the ALJ's holding. In its February 13, 1997 Order the Board noted that it was clear that Stephenson was not "an employee [of NASA] in the common-law sense of the term." As we noted above, *supra* at 8-9, the relevant question, the Board held, is "whether [Stephenson] is protected under the CAA against retaliation by an entity which, *albeit not her direct or immediate employer, is nonetheless a covered employer.*" February 13, 1997 Order, slip op. at 2-3 (emphasis added):

Without deciding the exact breadth appropriately accorded [the statutory terms "employer" and "employee"], we do conclude that, in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee The issue of employment relationship necessarily depends on "the specific facts and circumstances" of the particular case, however.

Id. at 3-4, citation omitted. In response to NASA's subsequent petition for reconsideration, we reemphasized our holding. Noting that an "employment relationship" is essential to the complaint, we stressed that such a relationship usually exists "between the complainant and the immediate employer. *In appropriate circumstances, however, protection may extend beyond the immediate employer.*" Order, April 7, 1997, slip op. at 2 (emphasis added). "The underlying question . . . is . . . : did NASA *act* as an employer with regard to the Complainant[], whether by exercising control over production of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment?" *Id.* at 4.

The ALJ did not refer to these ARB holdings in his decision on remand. Instead, he revisited the construction of the "employer" and "employee" language in the CAA employee protection provision. In doing so, the ALJ ignored the law of the case on this point, which we had already established. We first discuss the ALJ's construction of the CAA provision, and then demonstrate why it runs afoul of law of the case.

First, the R. D. and O. sets up a false dichotomy by framing the question as follows:

Initially, it must be resolved whether Complainant may file a complaint against "*any person*" as defined by the Clean Air Act, or whether she can file a complaint against *only her employer*. If Complainant can only file a remediable complaint against an employer, it must be determined *whether Respondent is Complainant's employer* within the meaning of the Clean Air Act."

R. D. and O. at 52 (emphasis added). Next the R. D. and O. determines that the plain language of the statutory provision "suggests that Congress intended to protect employees from discriminatory acts of their employers." *Id.* The decision notes that the provision refers to "employee protection" and uses the terms "employee" and "employer," prohibits acts which all relate to employment

activities which “occur in an employer/employee relationship”; and the remedies provided, such as reinstatement and back pay, are employment-related “such that a complainant who successfully litigated her case against a non-employer could not be granted any or all of the remedies provided.” *Id.* at 52.

The R. D. and O. also resorts to the legislative history of the CAA for assistance in determining whether Congress intended to protect an employee from their employer *or* a non-employer

A House Committee Report indicates that the best source of information for a company’s activity is its own employees. The history appears to focus the protection of the provision on workers who observe alleged environmental violations in their work places Furthermore, a second House Committee Report consistently refers to protecting employees from discriminatory acts in their employment In addition, the report repeatedly refers to an employee, and employer, and to employment related activities and remedies.

R. D. and O. at 52-53 (emphasis added).

Finally the ALJ concluded that the term employee in the CAA should be accorded its common law meaning, citing *Nationwide Mutual Ins. Co. v. Darden, supra*, and *Reid v. Methodist Medical Ctr. of Oak Ridge, supra*. The ALJ determined that Stephenson had failed to prove that she was an employee of NASA within that common law meaning. R. D. and O. at 54-61. In so ruling the ALJ ran afoul of the doctrine of law of the case.

The law of the case doctrine “is a prudential principle that ‘precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided.’” *Field v. Mans*, 157 F.3d 35, 40 (1st Cir. 1998)(quoting *Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd.*, 41 F.3d 764, 770 (1st Cir. 1994)). The aspect of law of the case which applies in this circumstance, referred to as the “mandate rule,” “instructs an inferior court to comply with the instructions of a superior court on remand.” *Field v. Mans, supra*, 157 F.3d at 40. *See Law v. Medco Research, Inc.*, 113 F.3d 781, 783 (7th Cir. 1997) (doctrine requires lower adjudicatory body to conform further proceedings in case to principles set forth in appellate opinion unless there is compelling reason to depart). The doctrine applies within administrative agencies as well. When this Board has ruled on a question of law, the law of the case doctrine binds an administrative law judge acting after a remand of the case. *See, e.g., Ruud v. Westinghouse Hanford Co.*, No. 1988-ERA-33, ALJ RD&O on Remand, Dec. 8, 1988, at 5.

Here the ALJ neither acknowledged the principles the Board articulated on the employer/employee issue in this case, nor did he conform his proceedings to them. In this case it has been undisputed from the outset that Stephenson was a common law employee of Martin Marietta, which was, in turn a contractor for NASA. However, we held that the reach of the CAA employee protection provision may, depending upon the specific facts of a case, encompass an

employee *who is not a common law employee of the respondent employer*. The ALJ's failure to look beyond the common law definition of employee in evaluating the evidence in this case was contrary to our specific holding.

As we discuss in the following section of this decision, Stephenson failed to prove that she engaged in activity which was protected by the CAA whistleblower provision. Therefore, we need not determine whether NASA's substantial involvement in Stephenson's work environment (*e.g.*, its bar on her working in, or even entering the Space Center complex, and NASA's action prohibiting Stephenson from talking with her NASA counterparts) rose to a sufficiently intense level of involvement and interference in Stephenson's employment that NASA might be held to come within the ambit of the CAA's whistleblower protection provision.

II. Collateral estoppel and law of the case do not apply to the Secretary's earlier ruling that Stephenson's complaint made a sufficient claim of protected activity under the CAA to survive a motion to dismiss.

In a perplexing ruling, the ALJ concluded that both collateral estoppel and law of the case prevented him from reexamining the issue whether Stephenson's activities were protected under the Clean Air Act:

The doctrine of collateral estoppel precludes a party against whom an issue has been decided in a prior action from re-litigating its position in a subsequent proceeding. The doctrine of collateral estoppel is applicable in administrative proceedings. Because the Secretary has decided that Complainant has stated a claim under the Clean Air Act, this issue is moot and therefore, need not be discussed further since the Secretary's determination is accepted as the law of the case.

R. D. & O. at 50 (citations and footnote omitted). The ALJ therefore took it as a given that Stephenson had engaged in activity protected by the CAA when she complained about the possible off-gassing of ETO and freon in the Space Shuttle, and the possibility that an astronaut could become infected as a result of a failure to adequately sterilize the PVPDs. The ALJ erred.

First, the doctrine of collateral estoppel does not operate in this case to preclude fact finding on the issue whether Stephenson engaged in protected activity. As the Secretary has explained, "[c]ollateral estoppel, or issue preclusion, prevents the relitigation of issues that *were actually decided by a court and necessary to its decision if the parties had a full and fair opportunity to litigate them.*" *Sawyers v. Baldwin Union Free School District*, Case No. 85-TSC-00001, Sec. Fin. Dec. and Ord., Oct. 24, 1994, slip op. at 18 (emphasis added).^{7/} At the time the Board rejected

^{7/} The Board has explained that four elements must be met for collateral estoppel to apply: "(1) the issues of both proceedings must be identical, (2) the relevant issues must have been actually litigated and decided in the prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues must have been necessary to support a valid and final (continued...)"

NASA's motion to dismiss, there had been no "full and fair opportunity" to litigate the issue whether Stephenson had engaged in protected activity. There had been a motion to dismiss *for failure to state a claim upon which relief could be granted*, an opposition to that motion, an ALJ order granting the motion, and a reversal of that order by the Secretary. All that the Secretary "actually decided" in his previous ruling with regard to Stephenson's allegations of protected activity was that the allegations in Stephenson's complaint were sufficient to survive a motion to dismiss for failure to state a claim.^{8/} Therefore, collateral estoppel does not apply.

The doctrine of law of the case does not apply for similar reasons. Because neither the Secretary nor the Board had held that Stephenson had engaged in protected activity, there was no law of the case for the ALJ to apply.

We could at this point remand this case one more time, for a determination whether Stephenson engaged in protected activity under the CAA when she complained about freon and ETO and possible infections. However, we choose not to prolong this already protracted proceeding any further. Because pursuant to the APA we possess the authority to find facts *de novo*,^{9/} and because the issue of protected activity in this case does not turn on any demeanor-based credibility determinations which are best suited to the ALJ who saw and heard the witnesses, we proceed to decide this issue.

III. The evidence establishes that Stephenson's complaints and other activities were not protected by the CAA.

To be protected under the whistleblower provision of an environmental statute such as the CAA, an employee's complaints must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1994, slip op. at 5; *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26, *aff'd*, 1995 U.S. LEXIS 9164 (9th Cir. Apr. 25, 1995). The complainant must "have a reasonable perception that [the respondent] was violating or about to violate the environmental acts." *Id.* The issue is one of the reasonableness of the employee's belief.

^{7/}(...continued)

judgment on the merits." *Agosto v. Consolidated Edison Co. of New York, Inc.*, ARB Case No. 98-007, ALJ Case No. 96-ERA-2, Ord. Of Consolidation and Fin. Dec. and Ord., July 27, 1999, slip op. at 8.

^{8/} Of course, on such a motion, "all reasonable inferences are made in favor of the non-moving party. . . ." *Tyndall v. United States Environmental Protection Agency*, Case Nos. 93-CAA-6 and 95-CAA-5, Sec. Dec. and Rem. Ord., slip op. at 3, and cases there cited. Further, "dismissal should be denied 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 4, quoting *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980).

^{9/} In reviewing an ALJ's recommended decision, the Board acts with "all the powers [the Secretary] would have in making the initial decision. . . ." 5 U.S.C. §557(b).

The purpose of the CAA is to protect the public health by preventing pollutants from fouling the ambient air.^{10/} Employee complaints about purely **occupational hazards** are not protected under the CAA's employee protection provision. *Minard*, slip op. at 5-6. See also, *Tucker v. Morrison & Knudson*, Case No. 94-CER-1, ARB Final Dec. and Ord., Feb. 28, 1997, slip op. at 5 (under environmental acts, complaint about violations that related only to occupational safety and not environmental safety were not protected). For example, in the case of asbestos, even though "the Environmental Protection Agency has regulated the manner in which asbestos is handled within workplaces during, among other things, renovation, to prevent emissions of asbestos to the outside air . . .," if the complainant is concerned only with "airborne asbestos as an occupational hazard, the employee protection provision of the CAA would not be triggered." *Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. 86-CAA-2, Sec. Rem. Ord., Apr. 23, 1987, slip op. at 3-4. Thus, the key to coverage of a CAA whistleblower complaint is potential emission of a pollutant into the ambient air.

With this principle in mind, we turn first to ETO, the main subject of Stephenson's complaints to her superiors in Martin Marietta and NASA about the PVPDs. There is no question that ETO is toxic to humans. The issue is whether Stephenson's complaints were based upon a reasonable perception that the use of ETO to sterilize the PVPDs would result in emission of potentially harmful levels of ETO into the ambient air.

The evidence in the record established that, while the astronauts were in flight in the space shuttle, the PVPDs were to be attached to the vein by an intravenous catheter line. The PVPDs were to be used to detect blood pressure. As Stephenson explained it at the hearing, she had three concerns. Primary among them was her concern that residual amounts of ETO in the PVPDs would contaminate the atmosphere in the space shuttle: "I went ahead and told Bill Seitz that I had been assigned to do this project and that I had some real concerns . . . that there are ethylene oxide residues left on the [PVPDs], and then being in the unique space environment, what is the off-gassing of this, because ethylene oxide is poison." T. 182. When asked if she would raise the same concerns if she could do it over again, Stephenson replied yes, "[b]ecause it was a duty to help save astronauts' lives in health and safety." T. 246; see also T. 249, 267-68. She also was concerned with the safety and health of the paid subjects who used the devices in testing conducted at the Space Center. T. 250. Finally, Stephenson was concerned because the ETO "could affect me and my co-workers. I don't know what the level of ethylene oxide was on that hardware." *Id.*

All of Stephenson's statements at the hearing indicate a concern about the effects of potential exposure to ETO on the health of workers – astronauts on board the space shuttle, paid test subjects

^{10/} In the CAA "Congress established a comprehensive state and federal scheme to control air pollution in the United States." *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984). Thus, one of the stated purposes of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §1857(b)(1). See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845-846 (1984). The CAA implementing regulations define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access. 40 C.F.R. §50.1(e) (1999). See *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 65 (1975) ("[A]mbient air" "is the statute's term for the outdoor air used by the general public").

at the Space Center, or workers in the room at the Space Center where the devices were to be kept after sterilization. Moreover, there was no testimony from which it could be concluded that there was even a remote possibility of the escape of any significant amount of ETO into the ambient air. For example, the off-gassing of minute amounts of ETO in the space shuttle would not lead to a harmful emission into Earth's atmosphere,^{11/} even when the space shuttle was on the ground. Even if there was some off-gassing from PVPD devices used by paid test subjects or stored at the Space Center, so little ETO would have been involved that even if it somehow escaped into the atmosphere outside the building, it could not be sufficient to come within the ambit of the CAA. Indeed, the EPA's National Emission Standard for ETO "does not apply to ethylene oxide sterilization operations at stationary sources such as hospitals, doctors offices, clinics, or other facilities whose primary purpose is to provide medical services to humans or animals." 40 C.F.R. §63.360(e) (1998).

Stephenson also raised a concern because freon was the carrier gas used in the ETO sterilization of the devices.^{12/} T. 183. In a written memorandum, Stephenson stated her concern: "In ETO sterilization, the carrier gas i[s] FREON. Has toxic off-gasing been done to PV[P]D assemblies to be sure this is totally removed?" Appendix at 642. Stephenson's concerns about freon, like her concerns about ETO, were based on worker exposure because only very minute amounts of freon could possibly be vented outside the space shuttle or outside of the building in which the devices were stored or used by test subjects.

Finally, Stephenson also expressed concerns that the ETO sterilization process would not work satisfactorily, and that as a consequence astronauts could become infected from unsterile PVPDs. Thus, she talked to Bill Seitz "about the hardware being sterile, beside – you know, besides the non-aseptic technique of assembling it and that my doubts about the reliability of the ETO sterilization at St. John Hospital" T. 182. There is not even a colorable argument that this concern could have been related to pollution of the atmosphere subject to the CAA.

We conclude that Stephenson's concerns about the use of ETA and freon in the sterilization of the PVPDs were not "grounded in conditions constituting reasonably perceived violations" of the CAA. *Minard, supra*, slip op. at 5. Therefore Stephenson did not engage in activities that were protected by the CAA.

IV. Additionally, NASA did not bar Stephenson from the Space Center and from discussing work with NASA employees because Stephenson engaged in activity protected by the CAA.

We have concluded in section III above that Stephenson did not engage in activity protected by the CAA when she complained about possible exposure to ETO and freon, and possible contamination of the PVPDs. However, even if we were to reach the opposite conclusion we would

^{11/} Of course, when the space shuttle is in orbit it is not even in Earth's atmosphere.

^{12/} The use and disposal of freon, a chlorofluorocarbon, is regulated by the EPA. 42 U.S.C. §7671g (1994).

dismiss Stephenson's complaint because NASA did not take action against Stephenson because of that activity.

We start with the undisputed fact that without authorization Stephenson moved 75 PVPDs into the hall outside the clean room and left them unattended for a time, thus breaking the chain of traceability of the devices. Because NASA could not account for what (if anything) happened to the devices while they were in the hall, it could not use the devices on the upcoming space shuttle (or on test subjects). Ultimately, NASA charged Martin Marietta \$4,700 for the destruction of the devices as flight hardware. NASA was left with about two weeks to get newly constructed PVPDs aboard the space shuttle.

In light of the universally negative reaction among NASA managers to Stephenson taking matters into her own hands and disposing of the devices without proper authority or procedures, there clearly was a legitimate reason to order that Stephenson keep away from NASA flight hardware. Martin Marietta's subsequent reprimand underscores that the mistake Stephenson made was disposing of the devices without approval:

Flight hardware is to be handled by established NASA procedures at all times and under no circumstances is it to be thrown away without approval from NASA and proper disposition of either a TPS or DR. In addition, you were also negligent in your failure to report your activities to your supervisor. As a result of your actions, expensive government hardware could have been destroyed and our ability to deliver the required hardware for the upcoming STS-60 mission was put at risk.

CX 14.

In the aftermath of the disposal incident, Martin Marietta assigned Stephenson to work other than preparing PVPDs for NASA space flights, but Stephenson continued to have access to the Space Center. However, a few months later, upon learning that Stephenson had visited the clean room during a time when PVPDs were present there, NASA's Kramer ordered that Stephenson not be permitted anywhere on Space Center property and barred her from discussing her work with employees of NASA's Life Sciences Directorate. *See* CX 2. We find that it was Stephenson's unexpected January 1994 visit to the clean room, in which new PVPDs were drying, that led NASA's Kramer to bar her from the entire Space Center. Kramer's reaction does not seem out of line in light of the fact that Stephenson had apparently disobeyed Kramer's previous order that Stephenson be kept away from flight hardware.

We are not persuaded that Stephenson's complaints regarding the PVPDs, ETO, and freon played any part in NASA's handling of Stephenson. Even though NASA employees assumed that Stephenson had raised the ETO sterilization issue with the NASA Inspector General, there is no evidence suggesting that NASA barred Stephenson's access to the Space Center because of her IG contact. To the contrary, several NASA employees testified that they understood Stephenson's

position in raising the issue, even as they condemned her unauthorized property disposal. For example, Villarreal testified:

If [Stephenson] seriously believed what she says she believed, then she was right to go to the Inspector General. But she was not right to unilaterally decide that flight hardware was contaminated and that they should be disposed of, putting our manifest at risk.

T. 689. Villarreal continued:

If I felt as strongly as [Stephenson] says she does about a safety concern, I would hope that I would pursue it as well. I personally would have gone straight to the Inspector General or straight to my boss and to the Inspector General. I would not have made the decisions that she made regarding flight hardware, but I respect that – I respect the gumption, if I can use that, to – that it would take to go to the Inspector General.

T. 697.

Moreover, NASA employees treated Stephenson’s concerns about the PVPDs and ETO seriously and promptly set about investigating them. Hite “appreciated” Stephenson’s safety concerns (T. 738), Lee conceded that Stephenson “was raising some very good points” (T. 805), and Seitz was interested in her concerns and promptly brought them to Kramer’s attention. T. 1152. Stephenson did not wait for a response, however: one work day after she raised the PVPD/ETO issue with Seitz, Stephenson disposed of the PVPDs.

CONCLUSION

Stephenson did not engage in activity protected by the CAA. Moreover, NASA did not bar her from the Space Center and from communicating with NASA employees for reasons prohibited by the CAA employee protection provision. Therefore, Stephenson’s complaint is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member